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Practice — Change of Venue Because of Local Prejudice; Abuse of Discretion — Plaintiff's three minor sons drowned in a water-filled hole excavated by defendant contractors. In an action based upon alleged negligence, the defendants applied for a writ of mandamus to compel the trial court to set aside its order denying the defendants' motion for a change of venue. Defendants predicated error upon the trial court's refusal to grant the change on the ground that an impartial trial could not be had in the county in which the action was brought by reason of excitement and sympathy created by the accident, and because of unfavorable newspaper publicity. The county newspapers publicized the financial condition of the parents, reported the progress of a relief fund for them, and discussed the likelihood that defendants were protected by insurance against accidents. Defendants' contentions of local prejudice were supported by 18 affidavits, and plaintiff controverted these by 15 counter-affidavits. *Held*: writ denied. The question of whether a change of venue should be granted because an impartial trial cannot be had in the county wherein the action is pending is a matter very largely in the sound discretion of the trial court, and its decision will not be reversed except for a clear abuse of discretion. *Sander v. Dieseth, 40 N.W. (2d) 844 (Minn., 1950).*[1]

Appellate courts, in the absence of a showing of a clear abuse of discretion, are reluctant to overturn a trial court's discretion on a change of venue sought by reason of local prejudice.[2] Abuse of discretion has been defined as "a clearly erroneous conclusion and judgment; one that is clearly against the logic and effects of the facts presented in support of and against the application" for a change of venue.[3]

Wisconsin has a change of venue statute similar to the Minnesota statute here.[4] The Wisconsin Supreme Court has consistently upheld the discretion exercised by its trial courts in the matter of local prejudice where the discretion has been supported by uncontroverted facts,[5] where it has been supported by facts as against opinions in con-

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[1] MINN. STATS. 542.11 (1945) "The venue of any civil action may be changed by order of the court in the following cases: . . . (3) When an impartial trial cannot be had in the county wherein the action is pending;"

[2] Guyer v. Smullen, 160 Minn. 114, 199 N.W. 465 (1924); State ex rel. Austin Mut. Ins. Co. v. District Court of Brown County, 194 Minn. 595, 261 N.W. 701 (1935); Dice v. Johnson, 187 Iowa 1134, 175 N.W. 38 (1919); Church v. City of Milwaukee, 31 Wis. 512 (1872); 56 Am. Jur., Venue secs. 56 and 74.

[3] Edwards v. State, 9 Okla. Crim. Rep. 306, 131 P.956, 44 L.R.A. (U.S.) 701 (1913).

[4] WIS. STATS. 261.04 (1947) "The court or the presiding judge thereof may change the place of trial in the following cases: (1) When there is reason to believe that an impartial trial cannot be had in the designated county and when so changed it shall be to a county in which the cause complained of does not exist."

[5] Church v. City of Milwaukee, 31 Wis. 512 (1872), where the Supreme Court upheld change of venue for local prejudice based upon 3 fact-reciting affidavits,

flicting affidavits,[6] where the personal knowledge and observation of the trial judge has been a factor in the exercise of the discretionary power,[7] and also where the discretionary power was exercised upon facts in opposing affidavits lending themselves to conflicting conclusions.[8]

In the instant case a mere numerical preponderance of affidavits in support of the requested change of venue did not prevent either a trial court denial of such change or an appellate court affirmance of such denial. On the other hand, where a Wisconsin trial court in *Cyra v. Stewart*[9] denied change of venue and where the overwhelming preponderance (151 to 38) of affidavits was against a change of venue, the Supreme Court reversed on the ground of abuse of discretion for the reason that the discretion was not based upon evidence or facts, in that the 151 affidavits did not recite facts but contained mere conclusions or opinions. The decision here against the mere numerical preponderance of affidavits is thus not unprecedented.

The *Cyra* case, unlike the instant one, did reverse for abuse of discretion. It thus gives us one positive standard for reversible abuse of discretion. It says that, on the question of local prejudice, facts must prevail over mere opinions and that to ignore facts in favor of opinions is reversible abuse of discretion by a trial court. A later Wisconsin decision in *Belden v. Field*,[10] reversing for abuse of discretion, gives us another positive standard for reversible abuse of discretion. There the Supreme Court held that denial of a change of venue requested by the defendant in an action brought in the county by the county judge as plaintiff was abuse of discretion. While other Wiscon-

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including that of the plaintiff, which were unopposed by anything offered by the defendant.

[6] Lego v. Shaw, 38 Wis. 401 (1910), where the Supreme Court said: "Mere statements of the belief or opinion of parties or witnesses as to the existence of local prejudice and influence, or adverse interest, will not be taken; but *facts* and circumstances showing the impossibility of obtaining an impartial trial must be fully and clearly presented, so that the court can judge for itself whether the application is well founded."

[7] Jackman Will Case, 27 Wis. 409 (1871), where in the contesting of a will the judge was aware that the sympathies of throngs of local people in the court room and in the hotels where jurors boarded were warmly with the contestants and against the executors. The Supreme Court held: "We cannot say that there was an abuse of discretion in the present case. In reaching the conclusion that the motion ought to be denied, the learned circuit judge may have been influenced by his personal observation and knowledge to which he might properly resort."

[8] Schattschneider v. Johnson, 39 Wis. 387 (1876), where voluminous affidavits were read in support of and against a motion for change of venue because of local prejudice, the Supreme Court upheld the trial court change of venue and said: "Those (affidavits) read in support of the motion, *considered alone*, are entirely sufficient to justify, if not to require, a change of the place of trial; opposing affidavits materially weaken the force of those read in support. Yet, considering all of the affidavits, we are inclined to think that the place of trial ought to have been changed."

[9] 79 Wis. 72, 48 N.W. 50 (1891).

[10] 211 Wis. 485, 248 N.W. 417 (1933).

sin statutes[11] applicable to a judge's interest in local litigation were relied upon in reversing the trial court, the element of local prejudice was a factor in the case and is necessarily implied in the statutes relied upon in that decision.

The *Cyra* and *Belden* cases are the only decisions in Wisconsin where the Supreme Court has reversed for abuse of discretion in the matter of local prejudice. Such rarity of Wisconsin decisions indicates the reluctance of appellate courts to interfere with the trial court exercise of discretion.

To the writer this reluctance, as exemplified in the instant case, seems to be carried too far. Certainly no fault can be found where affidavits on the issue of local prejudice are mere recitals of opinions or conclusions. However, where there is a close question of fact to be determined by the trial court, as appears here, discretionary power as upheld by the appellate court is too broad. Surely a change of venue to a more remote and disinterested jurisdiction cannot be prejudicial to either party, whereas denial of change of venue where there is a close question of fact might be unduly prejudicial to the party seeking the change.

No doubt the practical answer is that excitement, sympathy and possible local prejudice evaporates with time, particularly where litigation is delayed, and that change of venue would be the vexatious rule instead of the infrequent exception in an urban community where much litigation occurs. However, practical considerations can not obscure the fact that local prejudice can be initially present, and may linger to the detriment of the party seeking the change of venue.

GILBERT A. SCHNEIDER

Taxation — Patent Infringement Damages as Taxable Income — Plaintiff, a cash basis taxpayer, alleged in his complaint for patent infringement that he had been deprived of "large gains and profits" and prayed that the defendant be enjoined, that it be ordered to pay over both the profits derived from the infringement and the damages which the plaintiff had suffered therefrom. At the hearing before the master, the plaintiff abandoned his claim for profits, choosing only to press the claim for damages. In his report the master recommended that the award of the plaintiff be increased to make the taxpayer's recovery "more nearly adequate to compensate him for the damage to his business under his patent" and the court, following this recommendation, increased the award over forty-five thousand dollars. The judgment finally entered included damages for patent infringement, interest, the increase in the award, and the loss of profits on foreign sales. In his Federal income tax return for 1944, the plaintiff reported as taxable

[11] WIS. STATS. 261.01, 261.06, 270.16 (1931).